CHIDAMBARAM v. NAIR

[A.C.J. (Ong J.) July 24, 1964]

[K.L. — Civil Appeal No. 12 of 1962]

Landlord and Tenant — Temporary buildings erected by tenant on vacant land — Controlled premises — Tenant collecting rents exceedings statutory limit — Control of Rent Ordinance, 1956, s.12(1)(j).

Estoppel — Res judicata — Landlord claiming possession on grounds that premises not controlled and that tenant received excessive rents — Tenant joining issue on both — Court dismissing claim on ground that premises were controlled — Whether landlord estopped from instituting new action on ground that tenant received excessive rents.

The plaintiff's predecessor in title let to the defendant a piece of vacant land on which the defendant erected five buildings of a temporary character early in 1947 with the permission of the then owner. The plaintiff on becoming the owner of the said land brought an action in the Magistrates' Court to recover possession thereof on the grounds that (i) the defendant paid a ground rent only and was not entitled to the protection of the Control of Rent Ordinance and (ii) the defendant had rented out the said buildings from which he collected rents exceeding the statutory limit. No evidence was led by the plaintiff on the second ground. The learned magistrate considered himself bound by *Evelyn Saw Hee Li* v. *Gan Tit Sun*[1] that the definition of "premises" in the Ordinance did not include vacant land and gave judgment in favour of the plaintiff. That judgment was subsequently reversed on appeal (see *Nair* v. *Chidambaram* [2]).

About two months after judgment was given in the said appeal the plaintiff commenced the present action for recovery of possession on the ground that the tenant had sublet houses from which he received more rents than was permitted by law. The defendant pleaded estoppel *per rem judicatam* stating that the issues raised had been finally disposed of by *Nair* v. *Chidambaram.*[2] The learned magistrate upheld the plea and dismissed the claim with costs. On appeal,

Held: the plaintiff having failed to adduce evidence in support of the second ground (in the earlier action) in case his first ground should prove to be wrong was estopped *per rem judicatam* from relying on the same ground in this action.

Per Ong J.: "During the hearing of this appeal, I thought it right and expedient, in the interests of both parties, to canvass the question whether paragraph (j) of section 12(1) could, in strictness, be applicable because it seemed to me that by a confusion of thought two different norms were being homogenised in an attempt to bring this case within the four walls of paragraph (j). Could simple ground rent be identified with rent charged for a building erected thereon by the tenant at his own expense, the latter being a sum compounded of ground rent and an appropriate return for moneys invested in the building?....It is entirely *res integra* and had never been previously raised in any reported case....I have come to the conclusion after anxious deliberation, that on principle I am not at liberty to enlarge the statutory grounds contained in paragraphs (a) to (n), of section 12(1); *a fortiori* because the last paragraph is meant to be a general residuary provision to be applied where none of the preceding grounds can be invoked by the landlord. In my view, paragraph (j) is intended by the Legislature to cover only 'premises' which wholly belong to the landlord, that is to say, where both the building and the land on which it stands are the property of the landlord — and not where the 'premises' comprise both land belonging to the landlord and a temporary building which is the property of the tenant....On this point therefore, I hold that paragraph (j) could not have been invoked by the plaintiff for dispossession of the defendant."

Cases referred to:—

(1) *Evelyn Saw Hee Li* v. *Gan Tit Sun* [1959] M.L.J. 146.

(2) *Nair* v. *Chidambaram* [1961] M.L.J. 264.

(3) *Warren* v. *Warren* [1962] 1 W.L.R. 1310, 1313.

(4) *Ord.* v. *Ord.* [1923] 2 K.B. 432, 439.

(5) *Greenhalgh* v. *Mallard* [1947] 2 All E.R. 255, 257.

CIVIL APPEAL.

S. D. K. Peddie for the appellant.

M. J. Mathew for the respondent.

Cur. Adv. Vult.

Ong J.: The claim of the plaintiff in this case was defeated by a plea of *res judicata* which was upheld by the learned magistrate. Against such decision the plaintiff has brought this appeal.

The plaintiff is the present owner of a piece of land in the Municipality of Kuala Lumpur. It was vacant land when let to the defendant, who in 1947 erected thereon certain buildings of a temporary character with the permission of the then owner. The houses now bear the Nos. 8, 8A, 10, 10A and 12, Bungsar Road. The tenancy is a monthly tenancy, and the tenant pays a monthly rent of $6.50 and all assessments.

On April 23, 1960 the plaintiff commenced an action No. 596 of 1960 in the Magistrates' Court at Kuala Lumpur against the defendant claiming repossession of the land. The relevant facts set out in the statement of claim were as follows:

"3. The defendant has at all times paid a ground rent only for the said land and he is not entitled to the protection of the Control of Rent Ordinance, 1956.

4. The defendant has rented out all the said buildings except No. 8A in which he resides himself. He collects from his sub-tenants rents which exclusive of any payment for the services provided by the local authority exceed in the aggregate by more than ten per centum the rent payable by the defendant to the plaintiff.

5. The plaintiff duly served on the defendant notice to quit dated 14th March 1959 calling upon the defendant to deliver up vacant possession of the said land on or before the 30th day of April 1959. The defendant has not complied with the said notice and has not delivered up vacant possession."

The defendant in his defence pleaded (a) that having paid rent regularly he was entitled to the protection of the Control of Rent Ordinance, 1956; (b) that notice to quit had not been served on him, and (c) that there was an undertaking by the plaintiff to pay compensation for delivery of vacant possession. In reply to para

4 of the statement of claim the defence stated as follows:—

"The defendant denies paragraph 4 of the statement of claim, except that at present he resides at No. 12 and rents out all the said buildings."

The learned magistrate, after hearing the evidence on both sides, held against the defendant as to points (b) and (c), but as to point (a) he rightly considered himself bound by authority — Rigby J. having held in *Evelyn Saw Hee Li* v. *Gan Tit Sun* [1] that the definition of "premises" in the Ordinance did not include vacant land. In the result he gave judgment for the plaintiff.

This judgment was subsequently reversed on appeal: see *Nair* v. *Chidambaram,*[2] wherein I said:

"The sole question for determination in this appeal is whether a tenant who entered into possession of vacant land and then proceeded to erect thereon buildings of a temporary character is a tenant entitled to claim the protection of the Control of Rent Ordinance, 1956. There is no dispute that the buildings were erected early in 1947 with permission by the then owner of the land."

My grounds of decision were in these terms:

"In the instant case the appellant was let into possession of vacant land by the respondent's predecessor in title in or prior to 1947; he had erected thereon five houses which undoubtedly are of a temporary character as evidenced by their value; the date of erection brings these premises within the definition of "premises" in the Ordinance, and the land itself by ceasing to be vacant land becomes appurtenant to "premises". The appellant is consequently entitled to invoke the Ordinance against dispossession; and no case having been made out by the respondent under para (1) or otherwise, this appeal is allowed."

About two months after judgment was given in the above appeal the plaintiff commenced his second action against the defendant, Kuala Lumpur Magistrate's Court Civil Suit No. 2098 of 1961. Paragraph 3 of the statement of claim now conceded that "the tenancy is subject to the provisions of the Control of Rent Ordinance, 1956" but paragraph 4 repeated *verbatim* the same paragraph in the statement of claim in Civil Suit No. 596 of 1960.

The defence pleaded *inter alia* estoppel *per rem judicatam* in these terms:

"The defendant will contend that the plaintiff is estopped by reason of the present proceedings being *res judicata,* the issues herein having been finally disposed of by judgment of the High Court at Kuala Lumpur delivered on the 4th day of September, 1961 in Civil Appeal No. 4 of 1961. (*Nair* v. *Chidambaram* [2]).

This plea was upheld by the learned magistrate who accordingly dismissed the claim with costs. In awarding costs the learned magistrate has admitted in his grounds of judgment an oversight with regard to section 13 of the Ordinance.

I have set out the above relevant facts at some length, having in mind what Scarman J. said in *Warren* v. *Warren,*[3] "that only a detailed analysis of the issue sought to be raised, of the issue raised previously whose judicial determination is the *res judicata* relied on, of the pleadings under challenge, and of the judgment of the court which is the basis of the challenge, can reveal in any given case whether an estoppel arises or not."

Mr. Peddie, for the appellant, argues that there could be no estoppel by *res judicata* because no evidence had been led in the earlier action as to the issue of rent, in view of the decision turning solely on the question whether or not the premises were "premises" within the meaning of that term in the Ordinance. With respect, I do not think that this contention sets out the whole truth. It will readily be seen from the first statement of claim that in paragraph 3 the plaintiff took the stand that "the defendant has at all times paid a ground rent only for the said land and he is *not* entitled to the protection of the Control of Rent Ordinance, 1956". Then in paragraph 4 he pleads, most inconsistently, one of the grounds why protection should be withdrawn from a protected tenancy, namely, paragraph (j) of section 12(1). This plea was not only irrelevant but completely unnecessary, unless the plaintiff had to resile from the contention he put forward in paragraph 3. On the other hand, it may be that paragraph 4 was put forward as an alternative, in case paragraph 3 was held to be wrong. At any rate, paragraph 4 was traversed by paragraph 7 of the defence and thus put in issue. The plaintiff, however, chose to put forward only one side of his case, instead of taking the safer course of presenting both sides, in case the first should prove to be wrong. He had made his election, even though inadvertently and I do not think it will be right that he should have it both ways and be permitted a second bite at the cherry.

For authority I need only refer to the classic judgment of Lush J. in *Ord.* v. *Ord.*[4] where he said:

"The words *'res judicata'* explain themselves. If the *res* — the thing actually and directly in dispute — has been already adjudicated upon, of course by a competent court, it cannot be litigated again. There is a wider principle, to which I will refer in a moment, often treated as covered by the plea of *res judicata,* that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the court in the earlier proceedings and which he chose not to put forward."

The same principle was enunciated by Somerwell L.J. in *Greenhalgh* v. *Mallard* [5] as follows:

"I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them. In

Green v. *Weatherill* ([1929] 2 Ch. 221), Maugham J. quoted some observations by Wigram V.C., in *Henderson* v. *Henderson* (3 Hare 114): 'I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time'."

I am accordingly of opinion that the learned magistrate was right and the appeal ought to be dismissed.

During the hearing of this appeal, I thought it right and expedient, in the interests of both parties, to canvass the question whether paragraph (j) of section 12(1) could, in strictness, be applicable because it seemed to me that by a confusion of thought two different norms were being homogenised in an attempt to bring this case within the four walls of paragraph (j). Could simple ground rent be identified with rent charged for a building erected thereon by the tenant at his own expense, the latter being a sum compounded of ground rent and an appropriate return for moneys invested in the building? Counsel agreed to this point being set down for argument and were granted an adjournment till the following day for them to consider the point. It is entirely *res integra* and never been previously raised in any reported case. I am much indebted to counsel for their arguments and the assistance they had been able to afford me on the subject, but I have come to the conclusion after anxious deliberation, that on principle I am not at liberty to enlarge the statutory grounds contained in paragraph (a) to (n), of section 12(1); *a fortiori* because the last paragraph is meant to be a general residuary provision to be applied where none of the preceding grounds can be invoked by the landlord. In my view, paragraph (j) is intended by the Legislature to cover only "premises" which wholly belong to the landlord, that is to say, where both the building and the land on which it stands are the property of the landlord — and not where the "premises" comprise both land belonging to the landlord and a temporary building which is the property of the tenant.

The monthly rent of $6.50 payable to the plaintiff issues out of the land, whereas the rent collected by the defendant from his sub-tenants issues partly out of his own building and partly out of the plaintiff's property. On this point therefore, I hold that paragraph (j) could not have been invoked by the plaintiff for dispossession of the defendant.

The appeal therefore stands dismissed. The order for costs made by the learned magistrate is set aside, but the defendant-respondent will be entitled to the costs of this appeal.

Appeal dismissed.

Solicitors: *Skrine & Co.*; *M. J. Mathew.*

LOW TECK CHENG v. LEONG WAH; LIM KAY POH, 3rd Party

[F.C. (Thomson L.P., Tan Ah Tah F.J., & Chua J.) August 10, 1964]

[Singapore — Federal Court Civil Appeal No. 62 of 1963]

Landlord and Tenant — Claim for possession — Conflicting evidence — Trial judge holding plaintiff entitled to possession — Reconsideration of facts by Federal Court — Federal Court forming its own conclusions on evidence — Reversal of finding by trial judge.

L.K.P., the 3rd party in these proceedings, was the chief tenant of the whole of the ground floor of No. 114 East Coast Road, Singapore. In 1948 the plaintiff rented the premises from L.K.P. and carried on there a watch repairing and provision business under the name and style of Winsons. In 1950 the defendant rented from the plaintiff a portion (at the right front) of the premises at $65.00 per mensem inclusive of water and lighting and carried on there a business under the style of Eveready Flower Service. In 1951 the plaintiff, the defendant and one HKK entered into a partnership, the firm name of the partnership being Winsons & Co., dealing in shoes, textiles and general goods.

The plaintiff alleged that after his withdrawal from the partnership (3 months after Winsons & Co. commenced to carry on business) he continued to carry on his watch repairing business and that he never at any time gave the tenancy of the whole of the ground floor to Winsons & Co. He claimed that LKP was still his landlord of the whole of the premises while the defendant was his sub-tenant of a portion of the ground floor.

The defendant alleged that when the partnership was formed it took over the tenancy of the premises and paid rent direct to LKP and that Winsons and Eveready Flower Service ceased to carry on business. The defendant also alleged that about a month after the plaintiff's withdrawal from the partnership the plaintiff rented from Winsons & Co. a space in the left portion for $10 per mensem and another portion of the premises for a business known as Katong Flower Shop at $30 per mensem. The defendant maintains that in 1953 when HKK withdrew from the partnership, the defendant became sole proprietor of the partnership.

The trial judge in reviewing the evidence stated "It is indeed a difficult matter to decide on which side of this comparatively evenly balanced line the case falls. After giving the matter the best consideration I can on the materials before me I have not without some hesitation, come to the conclusion that the version of the matter given by the plaintiff and the 3rd party Lim Kay Poh (the chief tenant) is to be accepted in preference to that of the defendant and his witnesses", and ordered that the defendant should give to the plaintiff possession of those portions of the ground floor of the premises in question which were occupied by the defendant. On appeal,